NO. _____

IN THE

Supreme Court of the United States

SENTINEL TRUST CO., AND DANNY N. BATES, CLIFTON T. BATES, AND GARY L. O'BRIEN,
Petitioners

v.

KEVIN P. LAVENDER, COMMISIONER OF THE TENNESSEE DEPARTMENT OF FINANCIAL INSTITUTIONS, Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS FOR THE MIDDLE SECTION OF TENNESSEE, IN NASHVILLE

PETITION FOR WRIT OF CERTIORARI

CARROL D. KILGORE
Counsel of Record
95 White Bridge Road
Cavalier Bldg., Suite 509
Nashville, Tn 37205-1427
(615) 254-8801

QUESTIONS PRESENTED FOR REVIEW

Question No. 1: Pursuant to a valid and deliberate law conditionally authorizing seizure of a *state bank*, did Tennessee—by acts of its Commissioner of Financial Institutions—violate the Due Process Clause of the Fourteenth Amendment by seizing instead a *state trust company* without a prior hearing under a statute conforming to Federal Due Process hearing requirements,[1] but which authorized emergency seizure of a *state bank* without prior hearing only upon narrow grounds that were not met herein and that *could never be met* by a state trust company prohibited from exercising banking powers?

Question No. 2: Did Tennessee's taking of Petitioner trust company's valuable property and business herein violate the Due Process Clause of the Fourteenth Amendment in its narrowest meaning[2] as lacking due process *of that state's law*—not conflicting with this Court's present expanded Due Process jurisprudence—by its deliberate disregard of *all existing Tennessee law* that would have prevented or remedied the taking, including, *inter alia,* by *(i)* its pretense that statutory empowerment to seize a *state bank* authorized seizure of a *state*

---

[1] In accord with *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982),

[2] Expounded and applied by *Dent v. West Virginia,* 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889); *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 940, 34 L.Ed. 519 (1890); *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908).

trust company; (ii) its arbitrary refusal to apply its law of statutory construction to decide if state bank seizure statute impliedly authorized state trust company seizure; or *(iii)* even if so authorized, by its refusal to recognize that the clearly-stated statutory pre-condition to state bank seizure without prior hearing was not met; and because *(iv)* its appellate judicial review (a) was denied when such review could have interrupted liquidation without harm to any state or private interests and (b) when finally exercised upon appeal of right, the Court—by restricting the basis of its review to the administrative investigative record, without recognizing that the appeal was from a judgment based on an evidentiary trial record before it—then refused to perform the required broader bench-trial review, without any stated legal basis or explanation, thereby pretermitting decision of all of the briefed state law issues that would have required reversal, not addressed by the Court?

Question No. 3: Is decision of the foregoing Due Process Clause violation issues affected by the additional factors that *(i)* Only this Court has jurisdiction to review a state's appellate decisions; *(ii)* After Tennessee courts had demonstrated that they *would not* apply the state's law of statutory construction and before the evidentiary trial, a U. S. District Court refused to take jurisdiction of an injunctive action solely upon comity grounds, because "The higher appellate courts of Tennessee, and ultimately the United States Supreme Court, will be the final arbiters of the construction **and** interpretation of the Tennessee banking statutes at issue in this case."[3] and *(iii)* the law recognizes that facially-dispositive appellate issues, whose adjudication was declined when presented, remain without *res judicata* determination so as to be subject to later adjudication

---

[3] *Sentinel Trust Co., et al., v. Lavender,* 2004 U.S. Dist. LEXIS 27259 at *29 (M. D. Tenn., 2004; emphasis added).

by a United States District Court in any action within its jurisdiction?

PARTIES

Petitioner Sentinel is wholly-owned by Petitioner Danny N. Bates and his wife, so no Rule 29.6 disclosure is required; the other individual petitioners are Directors of Sentinel and the names of all other parties appear in the caption.

Contents

AUTHORITIES

CITATIONS TO REPORTS

The report of the decision of the Tennessee Court of Appeal is *Sentinel Trust Co., et al., v. Lavender,* 2005 Tenn. App. LEXIS 841 (Tenn.App., M.S., 2005), the order of the Supreme Court of Tennessee denying the timely Application for Permission to Appeal is not reported, and the trial court orders are not reported.

BASIS OF THIS COURT'S JURISDICTION

(i) The order of the Supreme Court of Tennessee was entered July 3, 2006, denying application for permission to appeal, which order imparted finality to the Opinion and Decision of the Tennessee Court of Appeals rendered December 29, 2005.

(ii) The statutory provision believed to confer on this Court jurisdiction to review the judgment and orders in question is 28 U.S.C. § 1257

CONSTITUTIONAL AND STATUTORY PROVISIONS

Such provisions are Constitution of the United States, Fourteenth Amendment, Section 1, 28 U.S.C. § 1257, and, as to Questions Nos. 2 and 3, limited excerpts from the Tennessee Banking Act, with relevant parts high-lighted, all printed in Appendix F.

STATEMENT OF THE CASE

The case originated with a timely petition filed in the Chancery Court of Davidson County, Tennessee, for writs of *certiorari* and then *supersedeas,* to review administrative actions of the Tennessee Commissioner of Financial Institutions in seizing the properties and business of Sentinel Trust Company situated in Lewis County, Tennessee.[4] All U. S. constitutional questions were raised at every stage of all proceedings, with excerpts printed in Appendix G. Such objections were made in the Petition for *Certiorari (Infra,* pp. G-142-145), the *Certiorari* trial brief *(Infra,* pp. G-145-147), Petitioners' Brief in the Court of Appeals *(Infra,* pp. G-148-149), and the Application for Permission to Appeal in the Supreme Court of Tennessee *(Infra,* pp. G-150-151).

Petitioners also sought to protect such rights by a separate Federal injunctive action under 42 U.S.C. § 1983

---

[4] The bank-seizure statute requires that after the Commissioner seizes a bank upon his administrative determinations, he must to seek approval of certain listed decisions by the local chancery court, without the commencement of any litigation therein. As a consequence, several final judgments approving such administrative decisions were also appealed to the Court of Appeals, and these appeals were consolidated for argument with the instant case after separate briefings, and were determined by a single opinion.

against the Commissioner in his official capacity only.[5] The Court dismissed the action without prejudice because of comity respect of state jurisdiction, stating, "The higher appellate courts of Tennessee, and ultimately the United States Supreme Court, will be the final arbiters of the construction and interpretation of the Tennessee banking statutes at issue in this case." *Sentinel Trust Co., et al., v. Lavender,* 2004 U.S. Dist. LEXIS 27259 at *29.

In May, 2004, the Commissioner of Financial Institutions (hereinafter, the Commissioner or the State) seized Sentinel Trust Company, not a bank, claiming authorization by a provision of the Banking Act (Tennessee Code, Title 45, Chapters 1 and 2) that empowered him to seize a "state bank" upon his determination that the statutory grounds for seizure were met.

At all times, it has been recognized by the State that there was no pre-seizure hearing. There was no statute whose literal terms authorized seizure of a state trust company, and when bank-seizure grounds existed, the statute, T.C.A. § 45-2-1502 and 45-2-1504 authorized seizure without a prior hearing **only** upon a determination that the state bank's condition "will result in serious losses to depositors, . . ." T.C.A. § 45-2-1502(c)(1). Bank depositors are unsecured creditors in

---

[5] This was filed upon the theory that actions of all state courts in refusing to apply the Tennessee law of statutory construction and application without statement of any statutory construction rationale met the conditions required for invoking Federal jurisdiction, where acceptance of Petitioners' arguments on construction would have nullified state action and rendered it unnecessary to consider any constitutional objections.

Tennessee as everywhere, and upon bank insolvency, Tennessee accords them no priority in payment from the bank's assets except to the extent of $100.00 per account. The state trust company is forbidden to engage in the banking business, which requires the acceptance of deposits that create the debtor-creditor relation, and therefore has no depositors.

Sentinel was indenture trustee on over 100 bond issues, in the course of which it received over $100 million a year from bond issuers on the required payment dates fixed by bond indentures and disbursed the same amount every year to bondholders on different dates fixed by the bonds.

The Department–Sentinel conflict arose some years after Sentinel became obligated to liquidate the bond-collateral assets of 63 health-care related companies, which became insolvent because Federal changes in reimbursement entitlement rendered their income insufficient to support their bond-payment obligations. As to each defaulted bond issue, Sentinel was authorized to liquidate at that issue's expense, and has first priority for payment of liquidation expenses from that issuer's assets.

All the bond-related funds were kept in a pooled bank account having a daily balance in the millions of dollars, with Sentinel's books showing all transactions in every account and their balances at all times. The liquidation labors had continued from around 1999 through seizure in May, 2004, in the course of which Sentinel liquidated the assets of 50 defaulted bond issues at no expense to itself or to the pooled funds because each issuer's assets were adequate.

To finance the liquidation during these years, Sentinel, with the State's knowledge and approval (as shown by the State's administrative record), charged all liquidation expenses against that issue's account, causing overdrafts that in effect

were equivalent to informal borrowings secured by the issue's pledged assets. These liquidations returned profits to the pooled funds without expense to the solvent bond-issuers, because their correct balances each month were credited with the average daily earning rates on the entire fund's Account. Profits for the pooled funds were realized because Sentinel's charges included 1½% per month, compounded monthly. This mode of financing liquidations on bond-issuer assets is followed by trust companies and bank trust departments throughout the country.

After the 2004 installation of a new Commissioner, he took exception to this method of financing through overdrafts as *de facto* loans, and insisted that Sentinel proceed in rapid stages to inject capital equal to the total negative of all remaining bond-issuers' accounts, *and then go out of business.* The negative balance was then over $7 million, more than half of which was in compounded interest to be received as profits by the pooled account as each issuer's liquidations were completed. Sentinel could not and did not make this contribution demanded by the Commissioner, and the Commissioner thereupon seized it, all its bank accounts, and its real and personal properties.

In the eventual evidentiary trial, the State conceded that financing liquidation through overdrafts had not caused any loss to any bond-holder[6] (trust beneficiary),[7] it conceded that

---

[6] THE COURT: I grant you all that. But as was pointed out, they had never as yet failed to pay a bondholder, right?

MS. KLEINFELTER: Right. But the problem there was it was because they were continuing -- when they had money come in June that may be for bond payments not due until December, they were using them to make the June

but for the seizure, Sentinel could have completed liquidation of all assets in the remaining 13 issues without any loss to bondholders—but that it could have done this only by continuing the customary allowance of overdrafts pending liquidation.[8]

At no time did the State find or allege that there was any threat of loss to "depositors" nor did it identify any statute forbidding this mode of temporary financing when the debt is covered by adequate collateral.

The development of Tennessee's "trust company" regulation was that the Commissioner had no authority over trust companies until a 1980 legislative amendment required that all future trust companies be pre-approved by the Commissioner to be chartered, and subjected those companies to limited regulation, with Sentinel being a "grandfathered" trust company immune from such regulation. Then in 1999, the Legislature amended the Banking Act, Chapters 1 and 2 of Title 45, to bring all other trust companies under the Department's regulatory authority. It did this by a provision that henceforth, such companies shall be "subject to Chapters 1 and 2 of this Title." T.C.A. § 45-1-124.

The Act authorized the Commissioner to seize a "state

---

bond payments. (Trial transcript, Vol. XIV, pp. 516-517)

[7] Relevant, because Tennessee law shields every corporate fiduciary from any monetary damages for any breach of trust except to the extent that this causes loss to a trust beneficiary or delay in receipt of a payment required by the indenture, T.C.A. § 35-3-117(j).

[8] *Supra,* n. 6.

bank," T.C.A. § 45-2-1502, but it contains entirely different provisions for liquidating the assets of a "state trust company," T.C.A. § 45-2-1021, which provisions do not include seizure; it provides that the Commissioner's "seizure powers" could be exercised over one other type of company, not including "Trust Company" within this provision, T.C.A. § 45-1-103(3); it declares that the word "bank" *includes* "trust company" as used in six code sections on fiduciary powers, T.C.A. §§ 45-2-1001 and 45-2-1002–1006; and it states that the Commissioner is authorized to use his "examination powers" over trust companies newly brought under the Act for the period from July 1, 1999 through June 30, 2002, T.C.A. § 45-1-124(h) .

The Attorney-General has insisted that the subjection of all trust companies to the provisions of "Chapters 1 and 2," being the Banking Act, *ipso facto* expanded the State's bank-seizure powers to cover trust companies as well. The Courts in this case accepted that insistence, although Tennessee law recognizes it is not an application of the law of statutory construction to "construe" the statute on the basis of an isolated provision, *Cummings v. Sharp*, 173 Tenn. 637, 643-644, 122 S.W.2d 423, 425, as quoted and followed in *Rose v. Blewett,* 202 Tenn. 153, 163; 303 S.W.2d 709, 713 (1957).[9] On this basis, Petitioners have insisted that the courts have refused to apply the law of statutory construction in approving the State's actions claimed to be a part of its bank-seizure powers.

This is the course followed by Tennessee courts in disposing of this litigation: The trial court—hearing arguments of law on the application for *supersedeas* to nullify the seizure

---

[9] These cases have followed since their decision, and neither has been subject to any critical comments in any judicial decision.

actions as not authorized by law, determinable by applying the law of statutory construction— denied the writ by opinion that did not purport to apply, nor even mention, the law of statutory construction *(infra,* App B).

On the subsequent evidentiary trial of the *certiorari* issues, the Court refused to consider any statutory construction argument because it had previously been rejected (without expounding any statutory-construction rationale),[10] despite a reminder that Due Process required the impartiality by retaining an open mind upon a trial on the merits (*Infra,* pp.G-163-165). In colloquy, the Court recognized that *if* financing by permitting overdrafts were illegal (as assumed) , the law did not empower the Commissioner to seize for any illegality except for impending "serious loss to depositors."[11]

---

[10] "THE COURT: I understand your argument about the statute. *That's been resolved, at least by this judge, against you.* I'm more interested in the facts here. I want to be very explicit here.

"The statute, 45-2-1502, says, 'If in the opinion of the commissioner an emergency exists which will result in serious losses to the depositor, the commissioner may take possession of the state bank without prior hearing. . . .

"Now, that's what the provision of the statute -- I mean, that's the issue before me, whether an emergency existed which will result in serious losses of the depositors." (Trial Transcript, Vol. XIV, p. 489; emphasis added).

[11] "MS. KLEINFELTER: Well, if it hadn't been for the seizures -- well, the problem is, Your Honor, without the seizure, Sentinel would not have stopped the practice, their illegal practice. They would have continued to use the funds.

In the evidentiary trial with no negative credibility determinations, Petitioners proved that Sentinel's operations were legitimate, accorded with universal trust company practices, had caused no losses to any trust beneficiaries, and that at the time of its seizure, Sentinel owed no debts against its multi-million dollars in assets.

By testimony of the President of the Tennessee Association of CPA's, as Sentinel's expert witness on the trial, it was proven that there was no basis for the Commissioner to determine that Sentinel was insolvent; that its method of financing imposed no hazard considering the size of the cash flow; that depending upon time lapsed until liquidation, interest charges on overdrafts would double, triple or even quadruple the return to the pooled funds; that such profit would belong to the bond issuers with money in the fund, not to Sentinel; and that it would be impossible to determine whether Sentinel would end up solvent or insolvent until the completion of all liquidations.

The Court did not discredit any of Sentinel's witnesses and the State did not call *any* witnesses, but relied on the administrative record, which was only an investigative record

---

"THE COURT: *But you can't seize to stop an illegal practice.* I mean, the commissioner has the authority to issue cease and desist orders. . . .

"THE COURT: That is not like a run on a bank where you are going to have two-thirds of *the depositors holding nothing, is it?* It may destroy Sentinel, but how would *the bondholders,* given if the trust -- the future relationship is transferred to another company, how does that harm the bondholders?"
(Trial Transcript, Vol. XIV, pp. 525, 528; emphasis added).

of the series of examinations, without any verbatim transcript, but including file memos of state-employee recollections of statements and events, e-mails and internal reports.

On appeal, Petitioners presented extensive argument on constitutional issues, statutory construction, the legality of using overdrafts in pooled trust-fund accounts to finance liquidation, and the lack of authority to seize. The Attorney-General's brief did not respond to these arguments, but presented its own argument that the Commissioner's actions were supported by the investigative record, as is done in review of administrative action on an evidentiary-hearing transcript, although the only administrative "record" before the Courts, as indicated above, was an investigative record of a series of examinations. The Court of Appeals accepted the State's position by treating the case as if were a review of such an administrative hearing determination, proven by a hearing transcript. The opinion gave no indication that there had even been an evidentiary hearing in the trial court as the basis of that Court's decision it was reviewing.

The opinion of the Court of Appeals failed to present statutory construction rationale on interrelated provisions of the Banking Act, not even mentioning "statutory construction" in its opinion. It disregarded Petitioners' showing that Tennessee had neither statutes nor regulations on a trust company temporarily using overdrafts to fund liquidations of properties adequate to cover expenditures, and that the only recognized standard was that of the Federal Government in the F.D.I.C.'s *Trust Manual and Manual of Examination Policies,* which recognizes the propriety of using pooled trust funds and permitting overdrafts for trust purposes. Hence, the Court of Appeals pretermitted consideration of all these issues presented by the Appellants therein.

With no trial court negative credibility determinations, such course of trial and appellate review leaves the case laden with unadjudicated issues with no state judicial remedy available. Apparent finality is imparted to the decision, with no court having applied the law of statutory construction to construe the statute. State law recognizes that if a court declines to resolve some issues that would require reversal, such unresolved issues are not *res judicata* upon the parties, *Shelley v. Gipson,* 400 S.W.2d 709 (Tenn., 1966);[12] 1 TENN.JUR., *Res Judicata,* § 30.[13] The opinion herein gave no justification for

---

[12] Stating, in part, "In *Cantrell v. Burnett, & Henderson Co.,* 187 Tenn. 552, 556-557, 216 S.W.2d 307 (1948), the Court held that the former judgment also *estops the parties* and their privies in any other cause of action *to relitigate any matter which was actually determined* in the prior suit." (400 S.W.2d, at 712; emphasis added).

[13] Stating, "No judgment is res judicata as to matters which have not been adjudicated." This is supported by footnoted citations, including *"Groveland Banking Co. v. City Nat'l Bank,* 144 Tenn. 520, 234 S.W. 643 (1921). It is denied that any case, either from the courts of the United States or elsewhere, governed by the general principles of the common-law jurisdiction, goes to the extent of holding that a judgment of a competent court having jurisdiction of the parties and subject matter is res judicata as to matters and *issues which it did not decide, but which, from the face of its record, it refused to decide* and exclude from its decision, although under the pleadings it might have decided, and had the right to decide. . . . [U.S. citations omitted] To sustain a plea of res judicata, it must appear that the issue was not only involved in a former suit, but that the issue was *litigated and*

its failure to apply the normal rule that upon appeal of a certiorari trial court' decision on an evidentiary bench trial to review administrative action, the appellate hearing is *de novo*, respecting credibility determinations, *Realty Shop v. Westminister Holding, Inc.*, 7 S.W.3d 581, at 596 (Tenn.App., M.S., 1999, App.den.1999), and that if the administrative agency or State rests its case upon the administrative record after the complaining citizen has submitted adequate testimonial evidence, such testimony is given effect as having been without refutation. *Wells v. Tennessee Board of Regeants,* 9 S.W.3d 779, at 785 (Tenn., 1999).

REASONS FOR GRANTING THE WRIT

This petition presents a glaring need for reaffirmation of the truth that the Fourteenth Amendment's Due Process Clause, as originally expounded by this Court, *still* prohibits each state from destroying a citizen's life, liberty, or property except by due process of *that state's law.*

A combination of factors render this case highly appropriate for resolving this common problem: This Court is the sole repository of the power to review final state appellate action. But this Court simply cannot sit as a court for the correction of errors. Yet if a state's appellate judiciary condones or participates in state forfeiture of life, liberty, or property not authorized by the law of the land, the consequence is a destruction of these constitutional rights without any apparent remedy, as well as the resulting concealment of the

---

decided. Hull v. Vaughn, 23 Tenn. App. 448, 134 S.W.2d 206 (1939). (Emphases added).

event by the state's judiciary .[14]

Such result is not contemplated by the Fourteenth Amendment nor by Acts of Congress designed to enforce it. This travesty occurs *(i)* by the appellate technique of giving no indication that issues were properly presented that would require a result different from that which was desired by the state appellate court, or *(ii)* by mis-stating dispositive facts and thereby adjudicating a fictitious case rather than the one before the Court. It should be reaffirmed that there has been no final *res judicata* determination of issues the court pretermitted at the appellate level.

Determinations by a U. S. District Court of the issues that should be given rational solution would not actually be an appellate review of state decisions. It would simply be a determination of issues never adjudged by the state appellate courts, despite appearances, although such state Court had the opportunity and duty to adjudicate them.

These dispositive but pretermitted issues must be determined, or else the Due Process Clause fails to control the actual dispensation of justice. Recognition that the issues remain subject to adjudication would be similar to permitting a collateral action against a judgment that is void for lack of subject-matter jurisdiction.

---

[14] This is particularly true in Tennessee, because records of every appealed case, including briefs and opinion, always have been preserved in the State's or Court's archives, but since around the turn of the century, a new policy requires that all such appellate records except the opinion be destroyed shortly after finality unless claimed by one of the parties.

There is great need for a clear decision through an enunciation by this Court that the core meaning of the Fourteenth Amendment's Due Process Clause remains effective, and that under that part of this nation's "supreme Law of the Land," no state court is free to omit performing its obligation to assure that *the law of the land of that state must be followed* whenever the State deprives any citizen of life, liberty, or property. Or else, there should be a clear explanation of how and why this basic protection has vanished.

The damage addressed by First Question *could* be resolved by a simple grant of the Writ and order vacating the appellate decision below and mandating that the Court of Appeals decide all controlling issues in full accordance with early Due Process decisions herein cited.[15]

Under the Second Question, a decision that state appellate courts are not constitutionally free to slough off valid constitutional objections without taking notice and making deliberate determination of controlling issues should impel greater state loyalty to this judicial obligation. In future cases, this would leave this Court free to vacate and remand by simple citation of past holdings, instead of laboriously undertaking to determine state-law questions.

---

[15] It being a historical fact that the Fourteenth Amendment and the early statutes enforcing it were largely impelled by a distrust of states' willingness or ability to honor the new obligations so created, even today, in litigation between a citizen and an executive at the highest level of state government, total impartiality by state judges would appear difficult to achieve.

In the instant case, there appears no impediment to this Court rendering an appellate decision on the merits because of the lack of confusion on the content of state law and the State's studied refusal to attempt to answer Petitioners' contentions at any level of Tennessee's judicial system.

The appellate disregard of governing law, as indicated above, *(supra,* pp. 11-12) is a clear and present evil. It cries out for a remedy.

Respectfully submitted,

CARROL D. KILGORE
95 White Bridge Road
Suite 590, Cavalier Building
Nashville, Tennessee 37205
Attorney for Petitioners
615-356-7677